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September 1, 2006

Via U.S. Mail and Electronic Submission

Office of Indian Energy and Economic Development
Attn: Section 1813 ROW Study
Room 20, South Interior Bldg.
1951 Constitution Ave. NW
Washington, D.C. 20245

Dear Sir or Madam:

The Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Tribe") submits the following written comments in response to a request by the Department of Energy and the Department of the Interior (collectively, the "Agencies") for public comment on the Agencies' Draft Report to Congress ("Draft Report") on energy rights-of-way on tribal lands as required by Section 1813 of the Energy Policy Act of 2005. The Agencies' request was published in the Federal Register on August 9, 2006 at 71 Fed. Reg. 45575. These written comments supplement the oral testimony of the Ute Tribe at public hearings held on the Draft Report in Lakewood, Colorado and Salt Lake City, Utah on August 24 and 25, respectively.

The Ute Tribe resides upon the Uintah and Ouray Reservation ("Reservation") in northeastern Utah, presently (and for many years) the site of significant oil and gas development activities. The revenue generated from the Ute Tribe's active management of mineral development on the Reservation is critical to the long-term financial success of the Tribe and its members. For that reason, the Ute Tribe has participated in the tribal right-of-way study under Section 1813 since the study's inception. The Ute Tribe has submitted the oral and written testimony of Tribal leaders and advisors, attended public comment meetings, sponsored research, conferred with the Agencies in government-to-government work sessions, and compiled and synthesized right-of-way data for use by the Agencies and their consultant, Historical Research Associates, Inc. ("HRA"). The Ute Tribe is committed to participating in the Section 1813 study

to ensure the continued success of its commercial relationships with its energy industry partners, and to protecting the Ute Tribe's sovereign interests.

The Ute Tribe, along with many other participants in the Section 1813 process, believes that the study described in Section 1813 is a misguided effort, tumbled into the Energy Policy Act of 2005 at the last minute to address the spurious and unsupportable agenda of a single pipeline company. Indeed, the impulse that led to the inclusion of Section 1813 in the Energy Policy Act is flatly inconsistent with the well-developed Congressional policy expressed in the much-more extensive and well-crafted Title V of the Energy Policy Act. As the Department of the Interior recently found, the policies underlying Title V of the Energy Policy Act "further the Federal Government's policy of providing enhanced self-determination and economic opportunities for Indian tribes and support the national energy policy of increasing utilization of domestic energy resources." Proposed Rule: Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 71 Fed. Reg. 48626 (August 21, 2006).

Furthermore, Congress once before studied whether Tribal consent should be required before issuance and renewal of rights-of-way across Tribal lands. In its report Congress concluded:

- "The consent requirement has not . . . adversely affected the public interest."
- To the contrary, "granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation."
- The consent requirement "has greatly enhanced the ability of . . . tribes to manage their own property and has strengthened their bargaining position with oil and gas pipeline companies, electric power companies, and other applicants for rights-of-way on their reservations."

"Disposal of Rights in Indian Tribal Lands without Tribal Consent," H. Rept. 91-78 ("Report"), at 3, 8, and 14. Thus, a move toward condemnation of tribal lands for energy rights of way is antithetical both to the promotion of energy development on tribal lands and to tribal self-determination. Nonetheless, the Section 1813 process threatens to erode the rights of tribe to consent to how their lands are used.

Despite its objections to the study outlined in Section 1813 of the Energy Policy Act, the Ute Tribe recognizes that the Agencies have been charged with conducting and completing the study described in that provision of the Energy Policy Act. The Ute Tribe also appreciates the magnitude of the task in assembling the Draft Report. The Ute Tribe has

reviewed the Draft Report, including the historical appendix prepared by HRA, and provides in a separate attachment a marked-up version of the text of the Draft Report with suggested changes in it. The Ute Tribe offers the following general comments on the Draft Report:

1. Federal – Tribal Relationship. While the Ute Tribe appreciates the agencies' goal of carrying out the section 1813 study and report in an objective manner, the Ute Tribe believes strongly that the issues under consideration must be viewed through the prism of the unique legal and political relationship between the United States and the Indian tribes. As the Congress, the courts, and the executive have affirmed repeatedly, this relationship --- a fiduciary relationship --- requires the United States to act in the best interests of the tribes and not simply engage in a balancing of competing interests. As explained by the Tenth Circuit Court of Appeals in *Jicarilla Apache Tribe v. Supron Energy*, 728 F.2d 1555, 1567 (10th Cir. 1984) (*opinion adopted en banc at* 782 F.2d 855), when a federal agency is "faced with a decision for which there is more than one 'reasonable' choice, [the agency] must choose the alternative that is in the best interests of the Indian tribe."

Under the policies expressed in *Supron*, all things being equal, the recommendations made by the Agencies should favor tribal interests. As discussed below, however, all things are not equal. The evidence reviewed in the Draft Report and the conclusions reached by the Agencies in light of that evidence establish that good public policy objectively favors tribal interests – including the fundamental right of tribes to consent to the use of their lands.

2. "Industry". The Draft Report often speaks of certain views or positions as being the position of "industry." *See, e.g,* Draft Report §§ 1.3.5, 1.3.6, 1.3.7, 1.3.8, 4.2. The record shows that there is no uniform view among participants in the energy industry or the pipeline industry, and that many companies working to develop tribal energy resources are convinced they can successfully secure energy rights of way on tribal land while recognizing a tribe's right to consent to that use. Representatives of the energy partners of the Ute Tribe – Bill Barrett Corporation, Questar Gas Management Company, and Berry Petroleum Company – presented oral and written testimony confirming that a tribe's right to consent is not an impediment to the energy development. Furthermore, many tribes, including the Ute Tribe, are the energy industry. The Ute Tribe has formed an energy company, and that company is actively pursuing development of energy resources on tribal lands and on non-tribal lands. The Final Report should correct this misleading oversimplification of the "industry" perspective.

3. Verification. The Ute Tribe provided HRA access to tribal records, and cooperated fully in the efforts of the Agencies to survey and document the historic rates of compensation paid for energy rights-of-way on tribal lands – an analysis required by Section 1813. In addition, the Ute Tribe commissioned a detailed study by the Analysis Group, and

submitted that study to the Agencies, along with detailed follow-up information as requested by the Agencies. The Ute Tribe believes that the Agencies must better distinguish between supportable facts identified by commenters and mere anecdotal evidence or speculation, and accord such comments appropriate treatment in the Draft Report. Like many tribes, the Ute Indian Tribe expended considerable time and effort compiling and synthesizing right-of-way data and other information for use in the Section 1813 study. It is troubling, then, when the Agencies provide attention in the Draft Report to unfounded and unsubstantiated claims. For example, in the final paragraph of Section 1.3.7, the Draft Report reproduces the claim of one trade group that trespass fees could cost utilities "hundreds of thousands, or even millions, of dollars" but then reveals that the commenter provided "no specific data or actual instances of such a problem." Repeating unsupported assertions can only serve to create or perpetuate misconceptions about operating in Indian Country and contributes nothing toward the statutory mandate of studying the issue. The Agencies must not allow opinion to substitute for supportable data.

As a further example of the problem of verification, the Draft Report also refers to a statement by one trade association (Edison Electric Institute) which notes that "if energy ROW costs increase by a factor of 227 (the median escalation over previous ROWs), total electricity costs will rise by 4% because of those increases." Draft Report, § 5.5.1. This estimate is entirely spurious, constructed without the benefit of any meaningful statistical analysis. Moreover, it is based on a casual and mathematically flawed calculation and upon data which the trade association itself admits are "sketchy" and of "limited value." Including this single figure in the Final Report would give this flawed calculation inappropriate credibility. Given that the Agencies' Final Report will be read by members of Congress and other decision makers without the time or resources to analyze the underlying data, assumptions and calculation, the unadorned transmittal of the "4% consumer impact" figure misrepresents the materiality of the concerns raised by the industry. We ask that the Agencies assess the credibility of that number, and similar numbers from all comments. The tribal commenters have devoted considerable resources to presenting careful and methodologically supportable estimates of consumer cost impact (which indicate cost impacts in the minuscule fractions of 1% of consumers' electricity costs). There is a real risk that some advocates and readers of the Agencies' report will take assertions like the EEI calculation as a representation of consumer impact that has some merit, or as one that is the analytical equivalent of the more comprehensive research and calculation, such as those prepared by the Analysis Group, and submitted as part of the comments of the Ute Tribe. The Ute Tribe asks the Agencies exercise their judgment in determining the credibility of the various technical submission made to the Agencies, and we believe that the Agencies will find it appropriate to omit the EEI estimate in the Final Report.

4. "Energy Right-of-Way". The Draft Report recognizes the potentially broad sweep of the phrase "energy right-of-way." *See* Draft Report § 1.2. El Paso Natural Gas

and its proxies (the "FAIR Access to Energy Coalition," Edison Electric Institute, and the Interstate Natural Gas Association of America) recently indicated that their primary, and perhaps sole, concern was the renewal of tribal rights-of-way for FERC-regulated interstate natural gas pipelines. Because the proponents of the Section 1813 process have clarified in the course of the hearings that their only concern arises in this limited context, then the scope of the phrase "energy right-of-way" should be construed in this manner, and the scope of the Section 1813 study (including any discussion of dispute resolution options) should be similarly limited in the Final Report. For the reasons apparent in the Draft Report, and as further discussed below, even this limited issue does not require a change in federal policy or any action by Congress.

5. Case Studies. The Ute Tribe is concerned that its case study documentation is not fully and accurately captured in the Draft Report. As the Ute Tribe commented to the Agencies during the scoping period for the Section 1813 study, the Tribe has in the past several years developed a throughput fee system for receiving compensation from natural gas pipeline owners operating on Reservation lands. The throughput fee is a simple but effective tool that ties right-of-way compensation to the economic value actually received by the right-of-way holder, and has fast become a standard term in pipeline transactions on the Reservation. Examples of such compensation terms have previously been provided to the Agencies in the Ute Tribe's comments of May 11, 2006, and are described in detail in the Analysis Group report. The Draft Report, however, only captures older and often more antiquated compensation methods in the case study of the Ute Indian Tribe. In fact, the most recent right-of-way compensation terms identified in the Ute Indian Tribe case study are from a 1991 right-of-way application for ROW No. H62-1992-80. Without identifying more recent terms like the throughput fee system, it is impossible for the Draft Report to fairly reflect the historical evolution of right-of-way compensation on the Uintah and Ouray Reservation. The Ute Tribe therefore requests that the three case studies set forth in the Analysis Group report dated may 11, 2006 be included in the Final Report prepared by the Agencies. If HRA or the Agencies need any additional information or documentation to verify those case studies, the Ute Tribe will be happy to provide that information.

6. Congressional Options. The Draft Report makes two facts abundantly clear: (1) the present system of right-of-way compensation on tribal lands does not have a significant impact on energy prices paid by consumers, and (2) the present compensation system does not pose a threat to energy security via the reliable delivery of energy to market areas. *See, e.g.,* Draft Report at Section 3 ("Departments have seen no evidence that tribal consent would be an issue in an emergency situation"), Section 4.2 ("Departments note . . . that most energy ROW negotiations are completed successfully"), Section 4.3 (Tribal ROW compensation "does not appear to be consequential for the nation or consumers" and "there is no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies to consumers"). Yet, despite these clear conclusions,

the Agencies present as options for potential congressional action such radical notions as establishing a federal entity to "determine fair compensation *for all energy ROWs across tribal land*," requiring binding third-party arbitration of right-of-way negotiation, and authorizing the "taking of land against the will of its [tribal] owner." Draft Report at Sections 4.4.2(c)-(e). As described in detail in the Ute Tribe's May 11, 2006 letter to the Agencies, which discusses in detail the longstanding policy of Congress and the Executive branch to recognize tribal consent to energy rights-of-way. The Agencies themselves recognize that these "options" would "involve major changes to the longstanding relationship between the tribes and the federal government concerning tribal sovereignty and the federal policy of self-determination." Draft Report at 4.4.2. These drastic notions are options to solve a problem that the Agencies acknowledge does not exist. Sections 4.4.2(c)-(e) are at odds with the substantial evidence presented to the Agencies and the factual conclusions of the Draft Report and should be removed.

7. The Required Recommendation. In addition to removing the options for consideration by Congress identified at Sections 4.4.2(c)-(e), the Agencies should take the additional step of affirmatively recommending to Congress that it pass no legislation diminishing the vigor of tribal consent to the use of tribal lands. Sections 4.4.2(c)-(e) of the Draft Report present options that force a tribe to accept an energy right-of-way across its lands, and to accept an externally imposed value for that use. The record before the Agencies demonstrates that energy companies and tribal governments can -- and virtually always do – negotiate right-of-way agreements that allow the transportation of energy across tribal lands. The case studies included in Section 5 of the Draft Report provide numerous detailed examples of how tribes and their energy partners have successfully developed rights-of-way agreements. In their recent comments, El Paso and its proxies have effectively admitted that there is no existing problem with energy rights-of-way. They argue that there is likely to be some future problem, but the evidence before the Agencies does not support that conclusion. Rather, the evidence before the Agencies, including the case studies developed by HRA, demonstrates that tribes and energy companies have and will continue to reach agreement on the terms of and consideration for the use of tribal lands for energy rights-of-way.

8. Condemnation and Trust. The condemnation options at Sections 4.4.2(c)-(e) of the Draft Report are also contrary to the fiduciary obligations of the United States toward Indian tribes. As discussed above, a federal agency faced with a decision for which there is more than one reasonable choice must choose the alternative that is in the best interests of the Indian tribe. Here, the Agencies are proposing alternatives under Sections 4.4.2(c)-(e) that would adversely impact tribes and which are not remotely reasonable in their relationship to the findings of the agencies. The decision to propose such "options" as part of the Draft Report is not in keeping with the fiduciary obligations of the United States to seek alternatives that promote the best interests of Indian nations. Rather, the Ute Tribe believes that the factual

record underlying the Draft Report, coupled with the fiduciary obligation of the Agencies to their tribal beneficiaries, compel the Agencies to recommend to Congress that it take no action to disturb the existing federal policy that recognizes the right of a tribe to consent to energy rights-of-way, including the renewal of those rights-of-way. *See, e,g.,* Ute Tribe May 11, 2006 letter to the Agencies.

9. Compensation and Consent. Section 4.4.2(c) of the Draft Report proposes the use of BLM compensation schedule as guidance for the valuation of tribal energy rights-of-way. The Draft Report notes that the BLM rate schedule "would need to be adapted to tribal lands." The Ute Tribe believes that the use of the BLM rate schedule, or similar non-negotiated valuation methodologies, fail to capture the unique nature of tribal lands. A land-based Indian tribe has no alternative if a right-of-way is placed on its land against its will. If a private land owner decides that he is tired of having a pipeline or electric transmission line on his land, he can sell his land and move elsewhere. Assuming that he was properly compensated for the right-of-way, then that land owner has suffered no economic loss. An Indian tribe, however, is tied to its land. It must husband that resource, and live on it in perpetuity. Thus, a tribe has an elevated interest in the use of its land, and cannot tolerate the notion that someone can use its land without its permission or grant. Also, an Indian tribe, unlike the federal government or even local governments, lacks a tax base to fund administrative services for its members as well as those who use tribal lands. The compensation payable to BLM does not address the burden of land use imposed on a tribe, and the Agencies should remove all references to the BLM compensation schedule as being appropriate for the valuation of tribal energy rights-of-way.

Finally, and more fundamentally, the right of consent allows a tribe to direct and control the use of its land. The case studies and the Draft Report reveal that the Ute Tribe actively develops its energy resources, and works creatively with energy developers to assure that energy transactions benefit all parties. Still, there is an area of the Ute Reservation that is pristine and sacred. The Ute Tribe has determined, as a matter of policy, that it will prevent any mineral development in this area. The Ute Tribe needs the right to consent to how its lands are used to protect this area. It can also use the right of consent to assure that energy development occurs on tribal lands in a manner that recognizes this important cultural policy. Land is not simply an economic matter to a tribe, and mere payment of moneys, even a "sovereignty premium," does not adequately reflect the non-economic value of land to a sovereign Indian tribe. Thus, the Ute Tribe believes that the Final Report should recognize that tribal lands are different from other lands, and that tribal consent to how those lands are used is a fundamental and irreducible principle.

The Ute Indian Tribe looks forward to working further with the Agencies to contribute to the successful completion of the 1813 study. To assist the Agencies in the development of the Final Report, the Ute Tribe has included a redline mark up of the Draft Report, which incorporates the comments above, as well as other improvements to the report suggested by the Ute Tribe.

Sincerely,

Maxine Natchees
Chairman, Ute Indian
Tribal Business Committee